



**SUPREME COURT OF CANADA**

**CITATION:** R. v. A.D.H., 2013 SCC 28

**DATE:** 20130517

**DOCKET:** 34132

**BETWEEN:**

**Her Majesty The Queen**  
Appellant  
and  
**A.D.H.**  
Respondent  
- and -  
**Attorney General of Ontario**  
Intervener

**CORAM:** McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:** Cromwell J. (McLachlin C.J. and Fish, Abella and Karakatsanis JJ. concurring)  
(paras. 1 to 76)

**REASONS CONCURRING IN** Moldaver J. (Rothstein J. concurring)  
**RESULT:**  
(paras. 77 to 159)

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R. v. A.D.H.

**Her Majesty The Queen**

*Appellant*

v.

**A.D.H.**

*Respondent*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: R. v. A.D.H.**

**2013 SCC 28**

File No.: 34132.

2012: October 11; 2013: May 17.

Present: McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Criminal law — Child abandonment — Mens rea — Accused gave birth in washroom at retail store and left newborn in toilet — Accused testified that she had not realized she was pregnant and that she believed child was born dead — Acquittal entered — Whether fault element is subjective or objective — Criminal Code, R.S.C. 1985, c. C-46, s. 214 “‘abandon’ or ‘expose’”, s. 218.*

The accused, not previously knowing that she was pregnant, gave birth while using the toilet in a retail store. Thinking the child was dead, she cleaned up as best she could and left, leaving the child in the toilet. The child was in fact alive, was quickly attended to by others and transported to the hospital where he was successfully resuscitated and found to be completely healthy. The accused was eventually identified as the woman seen entering and leaving the washroom at the time in question. When contacted by police, she cooperated fully and confirmed that she was the mother of the child. She was charged with unlawfully abandoning a child under the age of 10 years old and thereby endangering his life contrary to s. 218 of the *Criminal Code*.

The trial judge noted that the accused acknowledged that she had left her child in the toilet, thereby committing the *actus reus* of the s. 218 offence. As for the *mens rea*, the trial judge decided that subjective fault was required and found that the Crown had not proven beyond a reasonable doubt that the accused intended to abandon her child. She had not known she was pregnant and truly believed she had delivered a dead child. Her fear and confusion explained her subsequent behaviour.

The trial judge accordingly found the accused not guilty and dismissed the charge. The majority of the Court of Appeal agreed with the trial judge that s. 218 of the *Criminal Code* requires subjective fault.

*Held:* The appeal should be dismissed.

*Per* McLachlin C.J. and Fish, Abella, **Cromwell** and Karakatsanis JJ.:

The text of s. 218 of the *Criminal Code* does not expressly set out a fault requirement, but when read in light of its full context, it supports the conclusion that subjective fault is required. An important part of the context in which we must interpret s. 218 is the presumption that Parliament intends crimes to have a subjective fault element. There is nothing in the text or context of the child abandonment offence to suggest that Parliament intended to depart from requiring subjective fault. The text, scheme and purpose of the provision support this conclusion, and to the extent that the Parliament's intent is unclear, the presumption of subjective fault ought to have its full operation in this case. The legislative evolution of the child abandonment offence is, if anything, more supportive than not of this conclusion.

There is no doubt that the purpose of the abandonment offence is the protection of children from risk even when no harm occurs. Viewed in the light of the broad scope of potential liability under s. 218 of the *Criminal Code*, the requirement for subjective fault serves an important purpose of ensuring that the reach of the criminal law does not extend too far. While the conduct and people that

fall within s. 218 are broadly defined, the requirement for subjective fault ensures that only those with a guilty mind are punished.

The words “abandon”, “expose” and “wilful” all suggest a subjective fault requirement. The first two of these words involve more than just leaving a child alone or failing to take care of it: they denote awareness of the risk involved and, as defined in s. 214 of the *Criminal Code*, they suggest a requirement for knowledge of the consequences flowing from the prohibited acts of abandonment or exposure. As for the word “wilful”, it is used only in the non-exhaustive definition of the words “abandon” and “expose” in relation to omissions, and a wilful omission is the antithesis of a crime involving a mere failure to act in accordance with some minimum level of behaviour. Likewise, the use of the word “likely” in both ss. 214 and 218 does not suggest an objective fault requirement given that it is simply aimed at criminalizing the creation of risk.

Conversely, what is absent from the text of s. 218 of the *Criminal Code* and the broader scheme in which it appears strongly suggest that subjective fault is required. The text of the child abandonment provision does not contain any of the language typically employed by Parliament when it intends to create an offence of objective fault. The prohibition applies to everyone, not just to a particular group engaged in a regulated activity or standing in a particular, defined relationship with the alleged victim. Nothing in the text suggests an intention to impose a minimum and uniform standard of care. There are no references in the text to “dangerous”,

“careless” or “reasonable” conduct or any requirement to take “reasonable precautions”. There is no predicate offence and no actual harm is required by the provision, and it does not create, define or impose a duty to do anything other than in the sense that all criminal offences could be considered to create a duty not to commit them. While failure to perform a duty imposed by law on persons in particular relationships is the essence of the necessities of life offence created by s. 215, this is not at all the case with respect to the child abandonment offence under s. 218.

The text, context and purpose of s. 218 of the *Code* show that subjective fault is required. It follows that the trial judge did not err in acquitting the respondent on the basis that this subjective fault requirement had not been proved. The Court of Appeal was correct to uphold the acquittal.

*Per* Rothstein and **Moldaver JJ.:** Section 218 is child protection legislation. It targets three limited classes of people faced with a situation where a child under 10 is or is likely to be at risk of death or permanent injury. A common sense approach dictates that the offence is duty-based and that penal negligence is the level of fault required to establish guilt as regards the proscribed consequences. Further support for this view is found in a review of the provision’s language, its placement in the *Criminal Code*, relevant scholarly opinion, its legislative evolution and history and the gravity and social stigma associated with the offence.

Once it is accepted that in enacting s. 218 Parliament intended to guard against dangerous conduct that any reasonable person would foresee is likely to

endanger a child's life or expose it to permanent injury, common sense suggests that Parliament would not provide accused persons with a host of defences based on their individual characteristics. Doing so would effectively defeat the provision's purpose of imposing a societal minimum standard of conduct, since crimes of subjective fault require an assessment of personal characteristics to the extent that they tend to prove or disprove an element of the offence.

The recognition that s. 218 sweeps within its ambit persons who are already duty-bound to protect a child leads to the central difficulty with holding that s. 218 is, in its entirety, a subjective *mens rea* offence. If the great bulk of people to whom the provision applies have a pre-existing and ongoing legal duty to take charge of children who fall below the age of 10, it hardly seems reasonable that they should be judged against a subjective *mens rea* standard when the very same people who run afoul of the duty-based provision next door (s. 215 (failure to provide necessities)) are judged on a penal negligence standard in light of this Court's decision in *R. v. Naglik*, [1993] 3 S.C.R. 122. The result would be a double standard — an objective standard under s. 215 and a subjective standard under s. 218 — for provisions that serve similar, if not identical, purposes.

Section 218 can be read purposefully and harmoniously, such that it applies only to persons who are cloaked with a duty, whether pre-existing and ongoing or situational, to protect a particular child under the age of 10 from death or permanent injury, all of whom are properly subject to an objective standard with

respect to the consequences element of s. 218. The s. 214 definition should be restricted in scope as applying only to persons falling into the following three categories: (1) those with a pre-existing and ongoing legal duty to the child; (2) those who come to the aid of the child who is or is likely to be at risk of death or permanent injury, and; (3) those who actually place the child in that situation. Interpreting the scope of s. 218 in this way goes a long way toward addressing concerns about the broad scope of potential liability under the provision.

Section 218 finds its place in Part VIII of the *Criminal Code* under the heading “Duties Tending to Preservation of Life”. It is one of two offences located under that heading — the other being s. 215. This provides some indication that Parliament intended that s. 218 be construed as a duty-based offence. It seems anomalous that Parliament would insert a non-duty-based offence into a thicket of duty-related provisions. The scenario becomes even more remarkable when one appreciates that s. 218 is concerned with inherently dangerous conduct that places or is likely to place the lives and safety of helpless young children at risk. This is the very type of situation which requires a societal minimum standard of conduct and calls out for a standard of fault based on objective foreseeability. Likewise, the plain language of s. 218 — supported by the place of situational duties in Canadian criminal law, the offence’s placement among other duty-based provisions in the *Criminal Code* and the scholarship on s. 218 — leads to the conclusion that the offence of child abandonment is duty-based.



The legislative history of s. 218 further supports the conclusion that the fault element for s. 218 is penal negligence. The provision has never included words of subjective intention, as confirmed by the early English interpretation of the offence. Furthermore, neither the social stigma associated with it nor the gravity of the offence of child abandonment require it to be treated differently than its sister provision s. 215 (failure to provide necessities), where penal negligence was found to be the requisite fault element.

Under a penal negligence standard, a mistake of fact that is both honest and reasonable affords a complete defence. Thus, an objective *mens rea* standard does not punish the morally blameless. In the present circumstances, the trial judge found that the respondent honestly believed that her child was dead at birth and that this belief was objectively reasonable. As such, she was entitled to be acquitted based on the defence of honest and reasonable mistake of fact.

### Cases Cited

By Cromwell J.

**Considered:** *R. v. Naglik*, [1993] 3 S.C.R. 122; **referred to:** *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. L.M.*, [2000] O.J. No. 5284 (QL); *R. v. C.C.D.*, [1998] O.J. No. 4875 (QL); *R. v. Reedy (No. 2)* (1981), 60 C.C.C. (2d) 104; *R. v. McIntosh*, [2008] O.J. No. 5742 (QL); *R. v. Bokane-Haraszti*, 2007 ONCJ 228 (CanLII); *R. v. Christiansen*, [1997] O.J. No. 5733 (QL); *R. v. R. (J.)*, 2000

CarswellOnt 5325; *R. v. Gosset*, [1993] 3 S.C.R. 76; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Sweet v. Parsley*, [1970] A.C. 132; *Watts v. The Queen*, [1953] 1 S.C.R. 505; *R. v. Rees*, [1956] S.C.R. 640; *Beaver v. The Queen*, [1957] S.C.R. 531; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *R. v. Prue*, [1979] 2 S.C.R. 547; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Théroux*, [1993] 2 S.C.R. 5; *R. v. Lucas*, [1998] 1 S.C.R. 439; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *The Queen v. White* (1871), L.R. 1 C.C.R. 311; *The Queen v. Downes* (1875), 1 Q.B.D. 25; *R. v. Senior*, [1899] 1 Q.B. 283; *The Queen v. Renshaw* (1847), 2 Cox C.C. 285; *R. v. Hogan* (1851), 2 Den. 277; *The Queen v. Falkingham* (1870), L.R. 1 C.C.R. 222; *R. v. Boulden* (1957), 41 Cr. App. R. 105; *Re Davis* (1909), 18 O.L.R. 384; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705; *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, leave to appeal refused, [2011] 4 S.C.R. x; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Hundal*, [1993] 1 S.C.R. 867; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Finlay*, [1993] 3 S.C.R. 103; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Anderson*, [1990] 1 S.C.R. 265; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Holzer* (1988), 63 C.R. (3d) 301.

By Moldaver J.

**Considered:** *R. v. Naglik*, [1993] 3 S.C.R. 122; **referred to:** *R. v. Hinchey*, [1996] 3 S.C.R. 1128; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Lohnes*, [1992] 1 S.C.R. 167; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Browne* (1997), 33 O.R. (3d) 775; *R. v. Nicholls* (1874), 13 Cox C.C. 75; *The Queen v. Instan*, [1893] 1 Q.B. 450; *The Queen v. Salmon* (1880), 6 Q.B.D. 79; *R. v. Coyne* (1958), 124 C.C.C. 176; *R. v. Miller*, [1983] 1 All E.R. 978; *R. v. Lucas*, [1998] 1 S.C.R. 439; *The Queen v. White* (1871), L.R. 1 C.C.R. 311; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Senior*, [1899] 1 Q.B. 283; *R. v. Buzzanga* (1979), 25 O.R. (2d) 705; *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, leave to appeal refused, [2011] 4 S.C.R. x; *Leary v. The Queen*, [1978] 1 S.C.R. 29; *R. v. George*, [1960] S.C.R. 871; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523.

### **Statutes and Regulations Cited**

*Act respecting Offences against the Person*, R.S.C. 1886, c. 162, s. 20.

*Act respecting Offences against the Person*, S.C. 1869, c. 20, ss. 25, 26.

*Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, ss. 11, 12.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 33.1, Part VIII, 214 “‘abandon’ or ‘expose’”, 215, 216, 217, 217.1, 218, 219, 220, 221, 266, 269, 298, 300.

*Criminal Code*, S.C. 1953-54, c. 51, s. 185 “‘abandon’ or ‘expose’”.

*Criminal Code, 1892*, S.C. 1892, c. 29, ss. 209 to 211, 216.

*Offences against the Person Act, 1861* (U.K.), 24 & 25 Vict., c. 100, s. 27.

*Poor Law Amendment Act, 1868* (U.K.), 31 & 32 Vict., c. 122, s. 37.

*Prevention of Cruelty to, and Protection of, Children Act, 1889* (U.K.), 52 & 53 Vict., c. 44, ss. 1, 18.

*Prevention of Cruelty to Children Act, 1894* (U.K.), 57 & 58 Vict., c. 41, s. 1.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Richards, Smith and Ottenbreit JJ.A.), 2011 SKCA 6, 366 Sask. R. 123, 266 C.C.C. (3d) 101, 81 C.R. (6th) 303, [2011] 6 W.W.R. 10, 506 W.A.C. 123, [2011] S.J. No. 5 (QL), 2011 CarswellSask 10, affirming the acquittal entered by Gabrielson J., 2009 SKQB 261, 335 Sask. R. 173, 68 C.R. (6th) 74, [2009] S.J. No. 362 (QL), 2009 CarswellSask 388. Appeal dismissed.

*Beverly L. Klatt and W. Dean Sinclair*, for the appellant.

*Valerie N. Harvey*, for the respondent.

*Gillian Roberts and Jamie Klukach*, for the intervener.

The judgment of McLachlin C.J. and Fish, Abella, Cromwell and Karakatsanis JJ. was delivered by

CROMWELL J. —

## I. Overview and Issue

[1] Criminal offences generally consist of prohibited conduct (the *actus reus*) which is committed with a required element of fault (the *mens rea*). This appeal concerns the offence of child abandonment under s. 218 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Code”). The provision prohibits abandoning or exposing a child under the age of 10 years so that the child’s life is (or is likely to be) endangered, or its health is (or is likely to be) permanently injured. (The full text of the provision is found in the Appendix.) The question on appeal concerns the fault element of the offence: Is the fault element to be assessed subjectively or objectively?

[2] The issue arises out of a heart-rending story which, fortunately, has a happy ending. The respondent, not previously knowing that she was pregnant, gave birth to a baby boy while using the toilet in a Wal-Mart store. Thinking the child was dead, she cleaned up as best she could and left, leaving the child in the toilet. The child was in fact alive, was quickly attended to by others and, by all reports, is now a healthy little boy. The trial judge believed the respondent’s claim that she was not aware of her pregnancy until the child appeared and that she believed the child was dead when she left him. Thus, whether the fault element is assessed according to what the respondent actually knew or by what a reasonable person would have known and done is an important issue in this case.

[3] In general terms, when a fault element is assessed subjectively, the focus is on what the accused actually knew: Did the accused know that abandoning the child would put the child’s life or health at risk? If, as the respondent believed, the

child was dead when she abandoned him, she would not know that her abandonment of him risked putting his life or health at risk. Again to speak generally, when assessed objectively, the focus is not on what the accused actually knew, but on whether a reasonable person in those circumstances would have seen the risk and whether the accused's conduct is a marked departure from what a reasonable person would have done. If a court were persuaded that a reasonable person would have seen the risk of abandoning the child in these circumstances and concluded that the accused's conduct was a marked departure from that expected of a reasonable person, the fault element would be established even though the accused in fact did not see the risk.

[4] It follows that the issue for decision is this:

Does s. 218 of the *Code* require proof that the accused knew that the acts of alleged abandonment or exposure of a child were such that the abandoned child's life was or was likely to be endangered or his or her health permanently injured, as the respondent contends? Or, as the appellant Crown contends, is the fault element established by proof that the accused's conduct constituted a marked departure from that expected of a reasonable person in the same circumstances and that the risk to the child's life or health would have been a foreseeable result by such a person?

[5] As I will explain, I agree with the respondent that the trial judge and the majority judges of the Court of Appeal were correct to require subjective fault. I would therefore dismiss the Crown's appeal.

## II. Facts and Proceedings

### A. *Overview of the Facts*

[6] On May 21, 2007, users of the washroom at a Wal-Mart store discovered a puddle of blood on the floor of one of the stalls and heard the sounds of a young woman who we know now to have been the respondent struggling inside. The customers alerted the store staff, but when an assistant manager asked the young woman if she was all right, she responded from inside the stall that she was fine.

[7] Shortly thereafter, a customer reported that she had discovered a baby's arm sticking out of the toilet bowl of the stall where the young woman had been. Other customers had seen the baby by that point, but all of them thought it was dead. When the store manager went into the bathroom to see what was happening, he observed that the baby's leg had started twitching. He pulled the baby out of the toilet. An emergency response team was called and the baby, A.J.H., was transported to the hospital where he was successfully resuscitated and found to be completely healthy.



[8] Police gave video surveillance tapes of the store to various media outlets and the respondent was eventually identified as the woman seen entering and leaving the washroom at the time in question. When contacted by police, she cooperated fully and confirmed that she was the mother of the child. She was charged with unlawfully abandoning a child under the age of 10 years old and thereby endangering his life contrary to s. 218 of the *Code*.

[9] At her trial, the respondent testified. She was 22 years of age by that time and was living with her boyfriend and their baby, S.K. Prior to the birth of A.J.H., she had been gaining weight and so she had taken three home pregnancy tests, all of which were negative. She did not believe she was pregnant because she had been getting her period every month prior to the birth. When she arrived at the Wal-Mart store, she was not feeling well and so she went to the bathroom, where she gave birth a minute or two later. She was surprised by the birth. She did not try to pick the baby up because it was all blue and she thought it was dead. She did not respond to offers for help or tell anyone what had happened because she was afraid. She tried to clean up the blood on the floor and then returned to her friend's car.

[10] When she heard the police were looking for her, the respondent told her mother she was the one that had given birth to the baby in the store. When she found out the baby was alive, she was eager to see him. He now lives with the respondent's mother and the respondent visits him almost every day. A.D.H. testified that it took her five or six months to realize that she was pregnant with her second child, S.K.

B. *Court of Queen's Bench, 2009 SKQB 261, 335 Sask. R. 173 (Gabrielson J.)*

[11] The trial judge noted that the respondent acknowledged that she had left her child in the toilet at the Wal-Mart store, thereby committing the *actus reus* of the s. 218 offence. As for the fault element, the trial judge decided that subjective fault was required. He therefore expressed the issue he had to decide as follows: “. . . whether the accused . . . intended to abandon the child, A.J.H., or did so recklessly with full knowledge of the facts and circumstances or was wilfully blind in respect to them”: para. 15.

[12] The trial judge answered this question in the negative and found that the Crown had not proven beyond a reasonable doubt that the respondent intended to abandon her child: paras. 23-26. The accused had been credible in her testimony. She had not known she was pregnant and truly believed she had delivered a dead child. Her fear and confusion explained her subsequent behaviour. The trial judge also relied on the evidence of Dr. Simpson, who testified that, “[u]nder these circumstances of an unknown pregnancy and a premature, precipitous birth, it is understandable that the accused thought the child was not alive and that she would be scared or panicked, not request help and immediately leave the scene of the birth”: para. 24. Thus, the trial judge found the respondent not guilty and dismissed the charge: para. 26.

C. *Court of Appeal, 2011 SKCA 6, 366 Sask. R. 123 (Richards, Smith and Ottenbreit J.J.A.)*

[13] Richards J.A. (Smith J.A. concurring) agreed with the trial judge that s. 218 of the *Code* requires subjective fault. He supported his conclusion with a detailed analysis of the text and context of the provision. On the other hand, Ottenbreit J.A. concluded that s. 218 only requires an objective fault element, but that an honest and reasonable mistake of fact could be a defence. He found that the respondent had acted on the basis of the mistaken but reasonable belief that her child was dead and concluded that the trial judge's verdict of acquittal should be upheld on that basis.

### III. Brief Summary of the Positions of the Parties

[14] The appellant Crown submits that the fault element of the child abandonment offence should be assessed "objectively" according to what has been called the "penal negligence" standard, whereas the respondent submits that the fault element should be assessed subjectively, adopting the position taken by the trial judge and a majority of the Court of Appeal.

[15] In this case, a penal negligence standard means that the Crown must prove two things to establish the fault element: first, that the risk to the child resulting from the respondent's acts would have been foreseeable by a reasonable person in the same circumstances and, second, that her conduct was a marked departure from the conduct expected of a reasonable person in those circumstances. Penal negligence is the fault element that applies to the offence of failing to provide a

child with the necessities of life under s. 215 of the *Code* and the Crown submits that the same standard of fault should apply here.

[16] On the other hand, a subjective standard means, in the context of an offence under s. 218 of the *Code*, that the fault element requires proof at least of recklessness, in other words that the accused persisted in a course of conduct knowing of the risk which it created. Subjective fault, of course, may also refer to other states of mind. It includes *intention* to bring about certain consequences; actual *knowledge* that the consequences will occur; or *wilful blindness* — that is, knowledge of the need to inquire as to the consequences and deliberate failure to do so. But here, the element of risk (“is likely to”) is part of the definition of the prohibited consequences: the prohibited consequences under s. 218 are that the child’s life “is or is likely to be” endangered or its health “is or is likely to be” permanently injured. It is because the definition of the offence incorporates the notion of risk to life or health that a subjective fault element would require the Crown to show at least recklessness, that is, that the accused actually knew of the risk to the child’s life or health. (Wilful blindness would also suffice, but was not argued in this case. I also note that self-induced intoxication is not relevant here and was not argued. I do not find it either necessary or desirable to speculate about the various issues that would arise if it were raised in the context of this general intent offence. Simply by way of example, one would have to consider among other things issues such as whether the *ratio* of *R. v. Daviault*, [1994] 3 S.C.R. 63, applies, whether its application would or should be any different depending on whether the offence requires subjective or objective fault and

whether the child abandonment offence falls within the exclusion from the self-induced intoxication defence set out in s. 33.1(3) of the *Code* relating to offences that include as an element any interference or threat of interference by a person with the bodily integrity of another person.)

[17] The respondent also submits, in the alternative, that even if the required fault element is objective, the appeal should nonetheless be dismissed because she acted on the basis of a reasonable mistake of fact, that is, that the child was dead when she left him. I do not need to address this submission as I conclude that the fault element is subjective and therefore that the trial judge did not err in acquitting the respondent on the basis that the fault element had not been proved.

#### IV. Analysis

##### A. *Introduction*

[18] This Court has never addressed the fault element for the child abandonment offence and the relatively scant jurisprudence in other courts is inconclusive on this issue. Some cases have applied a subjective standard of fault: *R. v. L.M.*, [2000] O.J. No. 5284 (QL) (Ct. J), at para. 49; *R. v. C.C.D.*, [1998] O.J. No. 4875 (QL) (Ct. J. (Prov. Div.)), at paras. 24-30; *R. v. Reedy (No. 2)* (1981), 60 C.C.C. (2d) 104 (Ont. D.C.J.C.C.), at pp. 106-8. Others have either applied an objective standard or been unclear about the standard: *R. v. McIntosh*, [2008] O.J. No. 5742 (QL) (Ct. J.), at paras. 32-33; *R. v. Bokane-Haraszti*, 2007 ONCJ 228 (CanLII), at

paras. 25-26; *R. v. Christiansen*, [1997] O.J. No. 5733 (QL) (Ct. J. (Prov. Div.)), at paras. 8 and 18-19; *R. v. R. (J.)*, 2000 CarswellOnt 5325 (Ct. J.).

[19] Given that existing case law does not settle the question, our task is to “discern the intent of Parliament, having regard to the purpose of the section and the applicable principles of statutory construction”: *R. v. Gosset*, [1993] 3 S.C.R. 76, at p. 89. We must, therefore, read the words of the statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute, its objective and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41 (quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

#### B. *Statutory Interpretation and Fault Requirements*

[20] Discerning parliamentary intent in relation to the fault element of crimes is often not an easy task. Offences that have long been held to have subjective fault requirements do not expressly say so and even when Parliament decides to expressly set out fault requirements, it does not use language consistently: M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (4th ed. 2009), at pp. 148-149. As a result, the courts must, and often do, infer the fault element: see, e.g., *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, *per* Dickson J. (as he then was), at p. 146; *Sweet v. Parsley*, [1970] A.C. 132 (H.L.), *per* Lord Reid, at p. 148; K. Roach, *Criminal Law* (5th ed. 2012), at pp. 163-64.

[21] In my view, this is such a case. The text of the provision does not expressly set out a fault requirement, but the text read in light of its full context supports the conclusion that subjective fault is required. I will begin my analysis by touching on an important presumption of parliamentary intent that applies here and then turn to the purpose, text and scheme of the provision. In the course of that analysis, I will explain why, in my opinion, the Crown's position that this is an offence of penal negligence must be rejected.

C. *The Broader Context*

[22] I will review three elements of the broader context of the child abandonment provision: the presumption of legislative intent in favour of subjective fault, the provision's legislative evolution and finally its purpose.

1. *Presumed Legislative Intent*

[23] An important part of the context in which we must interpret s. 218 is the presumption that Parliament intends crimes to have a subjective fault element. The Court has stated and relied on this interpretative principle on many occasions: see, e.g., *Watts v. The Queen*, [1953] 1 S.C.R. 505, at p. 511; *R. v. Rees*, [1956] S.C.R. 640, at p. 652; *Beaver v. The Queen*, [1957] S.C.R. 531, at pp. 542-43; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1303 and 1309-10; *R. v. Prue*, [1979] 2 S.C.R. 547, at pp. 551 and 553; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 871; *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645; *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 18;

*R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 64. Perhaps the classic statement is that of Dickson J. (as he then was) for the Court in *Sault Ste. Marie*:

In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea* . . . .

. . . . Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law. [Citations omitted; pp. 1303 and 1309-10.]

[24] Notwithstanding these many statements, the Crown in effect submits that there is no such presumption of legislative intent because it has not always been applied. The Crown notes that there are many offences in the *Code* that do not require subjective fault and further that there is no absolute rule requiring complete symmetry between the fault element and the prohibited consequences of the offence. In my view, however, these points do not negate the existence of the presumption of legislative intent. They show merely that the presumption does not invariably determine the outcome of a full contextual and purposive interpretation of a particular provision.

[25] Presumptions of legislative intent are not self-applying rules. They are instead principles of interpretation. They do not, on their own, prescribe the outcome of interpretation, but rather set out broad principles that ought to inform it. As



Professor Sullivan has observed, presumptions of legislative intent, such as this one, serve as a way in which the courts recognize and incorporate important values into the legal context in which legislation is drafted and should be interpreted. These values both inform judicial understanding of legislation and play an important role in assessing competing interpretations: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 365.

[26] Professor Côté has described how these presumptions may inform the legal context in which legislation is drafted. He put it this way: “In some sense, presumptions of intent form part of the enactment’s context, as they reflect ideas which can be assumed to have been both present in the mind of the legislature and sufficiently current as to render their explicit mention unnecessary”: P.A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 470; see also R. Cross, *Statutory Interpretation* (3rd ed. 1995), by J. Bell and G. Engle, at pp. 165-67, and K. Roach, “Common Law Bills of Rights as Dialogue Between Courts and Legislatures” (2005), 55 *U.T.L.J.* 733. Parliament must be understood to know that this presumption will likely be applied unless some contrary intention is evident in the legislation.

[27] As for the role of the presumption of subjective fault in assessing competing interpretations, it sets out an important value underlying our criminal law. It has been aptly termed one of the “presumptive principles of criminal justice”: *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, *per* Charron J., at paras. 22-23. While the

presumption must — and often does — give way to clear expressions of a different legislative intent, it nonetheless incorporates an important value in our criminal law, that the morally innocent should not be punished. This has perhaps never been better expressed than it was by Dickson J. in *Pappajohn*, at pp. 138-39:

There rests now, at the foundation of our system of criminal justice, the precept that a man cannot be adjudged guilty and subjected to punishment, unless the commission of the crime was voluntarily directed by a willing mind. . . . Parliament can, of course, by express words, create criminal offences for which a guilty intention is not an essential ingredient. Equally, *mens rea* is not requisite in a wide category of statutory offences which are concerned with public welfare, health and safety. Subject to these exceptions, *mens rea*, consisting of some positive states of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of consequences, must be proved by the prosecution.

[28] Viewed in this way, the presumption of subjective fault is not an outdated rule of construction which is at odds with the modern approach to statutory interpretation repeatedly endorsed by the Court. On the contrary, the presumption forms part of the context which the modern approach requires to be considered.

[29] As I will explain, there is nothing in the text or context of the child abandonment offence to suggest that Parliament intended to depart from requiring subjective fault. In fact, the text, scheme and purpose of the provision support the view that subjective fault is required. To the extent that the Parliament's intent is unclear, the presumption of subjective fault ought to have its full operation in this case.

## 2. Legislative Evolution

[30] Legislative evolution and history may often be important parts of the context within which to conduct the modern approach to statutory interpretation: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43. The Crown has been diligent in providing us with a detailed picture of the English origins and Canadian evolution of what is now s. 218. I will touch on this only briefly, however, because as I see it, this information sheds little real light on the issue at hand.

[31] It seems that from the beginning, there were two strands of prohibitions, one addressing abandoning or exposing a child to risk to its life or health and the other in relation to the breach of a duty by people in certain relationships to provide the necessities of life.

[32] The origin of the abandonment offence appears to be in the English *The Offences against the Person Act, 1861*, 24 & 25 Vict., c. 100, s. 27, which created the misdemeanor of unlawfully abandoning or exposing any child under the age of two “whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured”. The early case law is unclear as to whether subjective or objective fault was required although there is some support for the view that subjective fault is required: see, e.g., *The Queen v. White* (1871), L.R. 1 C.C.R. 311, *per* Bovill C.J., at p. 313, and *per* Blackburn J., at p. 314.

[33] The necessities offence appears to have its origins in the English *The Poor Law Amendment Act, 1868*, 31 & 32 Vict., c. 122. Section 37 of that Act made it an offence for any parent to “wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured”. The fault element for this offence appears to have been objective: *The Queen v. Downes* (1875), 1 Q.B.D. 25, *per* Bramwell B., at p. 30.

[34] The two offences appear to have come closer together in England with the enactment of s. 1 of the *Prevention of Cruelty to, and Protection of, Children Act, 1889*, 52 & 53 Vict., c. 44, a provision that replaced s. 37 of *The Poor Law Amendment Act, 1868*. (The latter provision was repealed by s. 18 of the 1889 Act.) Section 1 made it a misdemeanor for anyone over 16 who had the custody, control, or charge of a boy under 14 or a girl under 16 to “wilfully” ill-treat, neglect, abandon or expose such child in a manner likely to cause such child unnecessary suffering or injury to its health. Again, the fault element is not very clear. In *R. v. Senior*, [1899] 1 Q.B. 283, the court approved jury instructions that seemed to describe both an objective and a subjective requirement.

[35] In Canada, the abandonment offence and the necessities of life offence have been kept distinct. The child abandonment offence was first enacted in 1869: *An Act respecting Offences against the Person*, S.C. 1869, c. 20, s. 26. The offence of failing to provide the necessities of life was found in s. 25 of the same Act, and

applied to individuals who were “legally liable” towards others. From 1869 to 1892, the child abandonment offence did not include any reference to duty: *An Act respecting Offences against the Person* (1869), s. 26; *An Act respecting Offences against the Person*, R.S.C. 1886, c. 162, s. 20. Thus, the provision’s early legislative evolution shows clearly that it was not conceived of as a duty-based offence, and suggests that a subjective intent was required.

[36] In 1892, both offences were included in the first *Criminal Code*, 1892, s.c. 1892, c. 29. The abandonment offence was found in s. 216 while the necessities offence was found in ss. 209 to 211. The abandonment offence was then similar to the current provision. It applied, however, only to children under two and required actual danger to life or permanent injury to health as opposed to the risk of those things occurring as under the current provision. A non-exhaustive definition of “abandon” and “expose” was added in 1892. For the first time, a reference to duty was added, but only in the context of omissions. The definition provided that “abandon” and “expose” included “a wilful omission to take charge of the child on the part of a person legally bound to do so”.

[37] The non-exhaustive definition added in 1892 also included “any mode of dealing with [the child] calculated to leave it exposed to risk without protection”. While I would not attach much weight to the use of the word “calculated”, I note that, if anything, it suggests a subjective fault requirement. This is consistent with the fact that the English case of *White*, mentioned earlier, appears to have required subjective

fault for the English equivalent of the abandonment offence. In 1954, the words “calculated to” were replaced by “likely to” in the non-exhaustive definition so that the provision read as it does today: *Criminal Code*, S.C. 1953-54, c. 51, s. 185. I would not attach much weight to this amendment. The *Oxford English Dictionary* (2nd ed. 1989) suggests that, particularly in the 18th and 19th century, “calculated to” and “likely to” could be used as synonyms. In any event, both “calculated to” and “likely to” are consistent with legislative intent to require subjective fault, albeit “calculated to” could be viewed as requiring specific intent, while “likely to” suggests that general intent is required.

[38] All things considered, my view is that the legislative evolution of the child abandonment offence is, if anything, more supportive than not of the view that subjective fault is required.

### 3. *Purpose and Breadth of the Offence*

[39] There is no doubt that the purpose of the abandonment offence is the protection of children from risk even when no harm occurs. Prior to the enactment of the offence of child abandonment in 1861, the offence required actual harm: *The Queen v. Renshaw* (1847), 2 Cox C.C. 285; *R. v. Hogan* (1851), 2 Den. 277. The new crime of child abandonment filled a perceived gap by punishing those who placed children in positions of risk: *The Queen v. Falkingham* (1870), L.R. 1 C.C.R. 222; *White*.

[40] It follows that the scope of potential liability under s. 218 of the *Code* is very broad, encompassing a wide range of persons and conduct. Liability is not restricted to those who are related to the child, or who have any duties in relation to the child or even to those who are in charge of the child at the time. In addition, a very wide range of conduct falls within the words “abandon” and “expose”. These are broad words that are not exhaustively defined under the *Code*.

[41] Viewed in the light of the broad scope of potential liability under s. 218 of the *Code*, the requirement for subjective fault serves an important purpose of ensuring that the reach of the criminal law does not extend too far. While the conduct and people that fall within s. 218 of the *Code* are broadly defined, the requirement for subjective fault ensures that only those with a guilty mind are punished.

#### D. *The Text of the Provisions*

[42] The text of the provisions are found in the Appendix. There are three main points which emerge from a careful study of the text and scheme of these provisions. First, the words “abandon”, “expose” and “wilful” suggest a subjective fault requirement. Second, the use of the word “likely” in this context does not suggest an objective fault requirement. Third, what is absent from the text of s. 218 of the *Code* and the broader scheme in which it appears strongly suggest that subjective fault is required.

##### 1. *“Abandon”, “Expose” and “Wilful” Suggest Subjective Fault*

[43] The words “abandon” and “expose” are not given an exhaustive definition in s. 214 the *Code* and therefore their ordinary grammatical meanings remain relevant to their interpretation. Both words suggest actions taken with knowledge of their consequences. The *Oxford Dictionary of English* (2nd ed. rev. 2005), for example, defines “abandon” as “cease to support or look after (someone); desert”.

[44] The same dictionary defines “expose” (in the sense of “expose someone to”) as “cause someone to be vulnerable or at risk” or “leave (a child) in the open to die”.

[45] The definition of “desert” is also helpful: “[A]bandon (a person, cause, or organization) in a way considered disloyal or treacherous . . .”.

[46] I agree with Richards J.A. that the words “abandon” and “expose” on their face, and standing alone, are indicative of subjective fault (C.A., at para. 59). They involve more than just leaving a child alone or failing to take care of it: they denote awareness of the risk involved. This view is also perfectly consistent with the statutory non-exhaustive definition of “abandon” or “expose” in s. 214 of the *Code* which, as noted earlier, suggests a requirement for knowledge of the consequences flowing from the prohibited acts of abandonment or exposure. This is also reflected in the jurisprudence. As noted in *L.M.*, abandon means “leaving the child to its fate” which suggests an act accompanied by knowledge of or recklessness as to the consequences: paras. 28 and 47; see also, e.g., *R. v. Boulden* (1957), 41 Cr. App. R.



105, at p. 110; *Re Davis* (1909), 18 O.L.R. 384, at p. 387. This is one of the factors that led the court in *Reedy* (No. 2), to imply a subjective fault requirement: p. 107.

[47] The Crown, in support of its position that the fault element is objective, argued that the non-exhaustive definitions of “abandon” and “expose” included in the *Code* in 1892 (now in s. 214) likely came from the English decisions of *Falkingham* and *White*. While those cases may well be the origin of the *Code* definition, this does not advance the Crown’s position. In both cases, there was evidence of subjective fault. In *White*, there was clear evidence that the accused intentionally and knowingly abandoned and exposed the child and was aware of the risk. In *Falkingham*, there was evidence of at least recklessness or wilful blindness: a mother, with the knowledge and connivance of another woman who was also charged with child abandonment, had put her child in a hamper and sent it by train to the child’s father without indicating to the railway employees that a child was in the package. The accused had been cautious in “packaging” the child, the mother indicated to the railway clerk to be very careful with it and wrote on the hamper “with care, to be delivered immediately” (p. 223). This indicated awareness of the risk.

[48] What emerges from both the ordinary meaning and the non-exhaustive statutory definition of the words “abandon” and “expose” is the notion of awareness of or recklessness in relation to risk.

[49] That brings me to the word “wilful” found in the s. 214 definition of the terms “abandon” and “expose”. Richards J.A. for the majority of the Court of Appeal

placed considerable weight on s. 214's use of the word "wilful" in concluding that subjective fault was required. The word "wilful" is often (although not always) a strong indication that intention is required: see, e.g., the discussion in *R. v. Buzzanga* (1979), 25 O.R. (2d) 705, at pp. 715-17; *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, at paras. 108-9, leave to appeal refused, [2011] 4 S.C.R. x; *Manning, Mewett & Sankoff: Criminal Law*, at pp. 149-50. While the word is used here only in the non-exhaustive definition of the words "abandon" and "expose" and only in relation to omissions, I agree with Richards J.A. that a wilful omission is the antithesis of a crime involving a mere failure to act in accordance with some minimum level of behaviour. If Parliament had meant to include in the terms "abandon" and "expose" situations in which there is no more than a failure to meet a standard of reasonable conduct, it would not make sense to require that omissions to observe that standard would have to be "wilful": C.A., at paras. 66-67.

## 2. The Word "Likely" Does Not Suggest Objective Fault

[50] Ottenbreit J.A., in deciding that only objective fault was required, placed considerable weight on the use of the word "likely" in the non-exhaustive definition of the terms "abandon" or "expose" in s. 214: para. (b) of definition — that is, "dealing with a child in a manner that is likely to leave that child exposed to risk". As he put it, "[t]he terms 'in a manner . . . . likely . . . .' . . . speak of the societal rather than a personal standard of conduct": para. 32. However, I do not think that the word

likely in this context is an indication of legislative intent to require only objective fault, for two reasons.

[51] The French version of the s. 214 definition uses the terms “*pouvant l'exposer*” and the French version of the s. 218 offence uses the terms “*exposée à l'être*”. The French wording suggests that the focus is on the outcome of the conduct rather than on the standard of care. This makes it clear that the English word “likely” serves the same purpose. Moreover, as I have discussed, the purpose of the child abandonment offence is to criminalize the creation of the risk of harm; it makes it an offence to expose or abandon a child such that its life or health is put at serious risk even if no harm actually results. This is consistent with the well-established view that the criminal law may properly be aimed at preventing the risk of serious harm: see, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 776; *Lucas*, at para. 83. The word “likely”, as it is used in both the s. 214 definition and in the offence provision itself (s. 218) is consistent with this preventive purpose. This purpose of criminalizing the creation of a serious risk of harm is not at all inconsistent with a requirement of subjective fault — that is, actual knowledge of the risk of harm — as is clear from the Court’s decision in *Lucas*.

[52] *Lucas* concerned the fault element of publishing a defamatory libel under s. 300 of the *Code*. A defamatory libel is defined in s. 298 to be a “matter published . . . that is likely to injure the reputation of any person”. The Court held that the fault element of the offence requires proof that the accused knew that the published

material was defamatory, in other words, that it was “likely to injure the reputation of any person”, *per* Cory J., at paras. 30 and 67-68. Thus, the term “likely to injure the reputation” was found to require proof of subjective fault, i.e. that the accused actually knew of the risk of injury to reputation.

[53] I therefore conclude that the use of the word “likely” in s. 214 (and s. 218) does not suggest an objective fault element; it does not as I see it speak of a societal rather than a personal standard of conduct. As in *Lucas*, the use of the word “likely” is simply aimed at criminalizing the creation of risk and, as in *Lucas*, the fault element may require knowledge of that risk.

### *3. What Is Not in the Text and the Scheme of the Code Suggest Subjective Fault*

[54] In my view, what is *not* in the text of the provision and what surrounds it suggest that a subjective fault element should be implied.

#### *(a) What Is Not Found in the Text*

[55] There is no doubt that Parliament can and does create criminal offences that require objective rather than subjective fault. How those provisions are drafted sheds some light on the sorts of language used when that is the intent. As I see it, the text of the child abandonment provision does not contain any of the language

typically employed by Parliament when it intends to create an offence of objective fault.

[56] I will briefly review five main types of objective fault offences in the *Code* in order to explain why, in my view, a comparison of the way they are drafted with the text of s. 218 supports the inference that the latter requires subjective fault. This will lead me to explain why I reject the Crown's position that penal negligence should apply to the s. 218 offence because it applies to the s. 215 offence of failing to provide the necessities of life.

[57] We come first to offences defined in terms of dangerous conduct. In *R. v. Hundal*, [1993] 1 S.C.R. 867, the Court found that the fault element of the offence of dangerous driving was a manner of driving which constituted a "marked departure" from that expected of a reasonable person in the same circumstances. (See also, more recently, *Beatty* and *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60.) Several factors justified adopting an objective rather than a subjective fault requirement: driving is a regulated activity in which people choose to engage; driving is automatic and reflexive in nature; and the text of the offence focuses on the manner of driving, all of which suggest that the offence seeks to impose a minimum uniform standard of care. Cory J. noted, for example, that "[l]icensed drivers choose to engage in the regulated activity of driving. They place themselves in a position of responsibility to other members of the public who use the roads": at *Hundal*, p. 884 (emphasis added). With respect to the text of the provision, Cory J. observed that it creates an offence of

driving “in a manner that is dangerous to the public, having regard to all the circumstances” and this suggests an objective standard: “The ‘manner of driving’ can only be compared to a standard of reasonable conduct”: p. 885. So in the case of dangerous driving both the text and nature of the provision, as well as other factors, provided strong support for an objective fault element. None of those factors is present in the s. 218 offence.

[58] Next, there are offences which are expressed in terms of careless conduct, such as the careless storage of firearms. In *R. v. Finlay*, [1993] 3 S.C.R. 103, the Court concluded that the carelessness targeted by the offence is not consistent with subjective fault. The provision required the Crown to establish that a firearm was used, carried, handled, shipped or stored “in a careless manner or without reasonable precautions for the safety of other persons”. The use of the word “careless” and the reference to “reasonable precautions” were clear markers of objectively assessed fault: pp. 114-15. There is no similar language in s. 218.

[59] A third category relates to so-called predicate offences. These are offences such as unlawful act manslaughter and unlawfully causing bodily harm which require the commission of an underlying unlawful act. They have been found to require the mental element for the underlying offence but only objective foresight of harm flowing from it: see, e.g., *R. v. DeSousa*, [1992] 2 S.C.R. 944 (unlawfully causing bodily harm); *R. v. Creighton*, [1993] 3 S.C.R. 3 (unlawful act manslaughter). Without reiterating the detailed reasons given in those cases, I simply underline that

these offences are ones in which the commission of the predicate or underlying offence has actual and serious consequences. As Sopinka J. said in *DeSousa* (at p. 967) and McLachlin J. repeated in *Creighton* (at p. 55): “The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused.” This rationale has no application to s. 218; there is neither a predicate offence nor any need to show that actual harm resulted from the conduct in the child abandonment offence.

[60] On that point, I note that at the court of appeal level, the Crown suggested that the word “unlawfully” in s. 218 was intended to imply that a violation of s. 215 constituted a predicate offence to child abandonment. I disagree. Rather, I agree with Richards J.A. that the word “unlawfully” in s. 218 is mere surplusage that was left from the original text in *An Act respecting Offences against the Person* (1869), s. 26: see, e.g., *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 886-87. The commission of a s. 215 offence, or any other offence, is not required for purposes of a child abandonment conviction. Section 218 has a broader application than s. 215, which only applies to specific individuals. To hold that a conviction under s. 218 is dependent upon a conviction under s. 215 would overlook the words “[e]very one” in s. 218, void para. (b) of the s. 214 definition of meaning, and would render s. 218 redundant, as it would serve the exact same purpose as s. 215. Section 218 does not provide for a greater sentence and therefore it is not merely an enhanced form of s. 215, in the way that, for example, unlawfully causing bodily harm (s. 269, maximum sentence of 10 years) is an enhanced version of assault (s. 266, maximum sentence of 5 years).

[61] I should also refer to the offences based on criminal negligence: see, e.g., ss. 219, 220 and 221. Criminal negligence is defined as conduct that “shows wanton or reckless disregard for the lives or safety of other persons”: s. 219. The text of this provision has fueled much debate about the required fault element. The use of the word “negligence” in the name of the offence suggests an objectively defined standard consistent with the meaning of the word “negligence” in the common law of torts. On the other hand, the words “wanton and reckless disregard” could be taken as describing actual knowledge of the risk created by the conduct and therefore a subjective fault element: see *R. v. Anderson*, [1990] 1 S.C.R. 265, at pp. 269-70. Ultimately, the Court decided that proof of intention or actual foresight of a prohibited consequence is not required. Rather, criminal negligence requires a marked and substantial departure from the conduct of a reasonably prudent person in circumstances in which the accused either recognized and ran an obvious and serious risk or, alternatively, gave no thought to that risk: *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at paras. 7-11.

[62] This approach to the fault element in the criminal negligence offences does not in my view suggest that a similar, objective fault approach should be taken to the child abandonment provision that concerns us in this case. Unlike the criminal negligence offences, the s. 218 offence is not described as being concerned with conduct that is governed by a community standard rather than an individual appreciation of the circumstances.



[63] I turn to a fifth and final category, one strongly relied on by the Crown in its submissions. That category consists of the duty-based offence in s. 215 of the *Code*. Consideration of this category and of this submission requires a closer look at the scheme of the *Code* and the Court's decision in *R. v. Naglik*, [1993] 3 S.C.R. 122.

(b) *The Scheme of the Code*

[64] Various legal duties are set out in ss. 215, 216, 217 and 217.1 including duties to provide the necessities of life and to use reasonable knowledge, skill and care in administering surgical or medical treatment. However, s. 215 is the only provision that creates an offence, that of failing to provide the necessities of life. The Court in *Naglik* held that this offence is one of objective fault and the Crown appellant submits that the same reasoning should apply to the abandonment offence under s. 218.

[65] Respectfully, this submission is not persuasive. The s. 215 offence is structured entirely differently than the s. 218 offence that concerns us here and the reasoning of *Naglik* is not applicable to the s. 218 offence. That reasoning in fact supports the view that *subjective* fault is required in s. 218. Finally, the different purposes served by both offences also support that view.

[66] Consider first the differences in the text of the two provisions. Unlike the s. 218 child abandonment offence, the s. 215 necessities of life offence considered in *Naglik* is defined in terms of failure to perform specified legal duties. What is more,

these specified legal duties arise out of specified relationships between the person owing the duty and the person to whom the duty is owed. (The text of s. 215 is found in the Appendix.)

[67] The essence of the s. 215 offence, then, is that it imposes legal duties arising out of defined relationships. It is clear that the decision in *Naglik* was based on that premise. Lamer C.J. writes, in *Naglik*:

With respect to the wording of s. 215, while there is no language in s. 215 such as “ought to have known” indicating that Parliament intended an objective standard of fault, the language of s. 215 referring to the failure to perform a “duty” suggests that the accused’s conduct in a particular circumstance is to be determined on an objective, or community, standard. The concept of a duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its content for him- or herself according to his or her subjective beliefs and priorities. Therefore, the conduct of the accused should be measured against an objective, societal standard to give effect to the concept of “duty” employed by Parliament. [p. 141]

[68] The Crown submits that this reasoning applies equally to s. 218 because that offence, too, may be committed by a person who fails in a legal duty to take charge of a child. I do not accept this position. While failure to perform a duty imposed by law on persons in particular relationships is the essence of the offence created by s. 215, this is not at all the case with respect to child abandonment under s. 218. This is why the reasoning of *Naglik* cannot apply to s. 218. The child abandonment offence may be committed by “[e]very one”; it is not restricted to persons in particular relationships or under specified, statutorily created legal duties.

The concept of duty in the child abandonment offence becomes relevant only in relation to an omission and is found in the non-exhaustive definition of “abandon” or “expose”. Those terms include “a wilful omission to take charge of a child by a person who is under a legal duty to do so”: para. (a) of the s. 214 definition. In my opinion, the reference to “legal duty” in relation to omissions in this section simply gives effect to the common law principle that criminal responsibility generally does not arise from an omission unless there is a pre-existing legal duty to act: see, e.g., K. Roach (2012), at p. 115; D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 95. Therefore, the effect of the reference to duty in para. (a) of the s. 214 definition is to ensure that the offence applies to omissions by those with a legal duty towards a child. However, the child abandonment offence does not impose any such duties and people with no duty may be liable, but only for positive acts captured, for example, by the words “dealing with” in para. (b) of the s. 214 definition.

[69] The brief comments about the child abandonment offence in both Stuart, at p. 96, and Roach (2012), at p. 116, do not support the view that the fault element of the offence is objective. Rather they point out, as I have just discussed, that the concept of duty appears in this offence only in relation to omissions. As for the Manning and Sankoff treatise, it expresses the view the s. 218 offence is “entirely superfluous” (p. 826) — a conclusion with which I disagree for the reasons I have already set out. I note that some of the case law cited by Manning and Sankoff involved parents who were convicted of child abandonment for having *knowingly* left

their child in risky circumstances: p. 827, notes 155-56; *Christiansen*, at para. 8; *R. v. Holzer* (1988), 63 C.R. (3d) 301 (Alta. Q.B.), at p. 303.

[70] Further, it seems to me that the clearly different structures of the text of s. 218 on one hand, and the duty-based offence in s. 215 on the other, support the view that the s. 218 offence is different. Where Parliament intended to base an offence on violation of a duty, s. 215 shows that it could find the language to do so clearly. None of this sort of language appears in s. 218.

[71] The distinct structure and wording of the child abandonment offence also counter any suggestion that its placement in the same part of the *Code* with the sections creating legal duties (i.e. ss. 215 to 217.1) informs the nature of the required fault element. The placement of a provision within the *Code* or the elements of other offences in the same part of the *Code* do not often assist in determining the nature of its fault requirement and are particularly unhelpful here: see, e.g., *Pappajohn*, at p. 146. While the provision is placed under the heading “Duties Tending to Preservation of Life”, the marginal note of s. 218, “Abandoning child” is the only one of the five sections under this heading which does *not* have the word “duty” in its marginal note. If anything, this tends to underline that it is different from the other provisions.

[72] The child abandonment offence has the same range of possible punishments as does the objective fault offence of failing to provide necessities in s. 215. However, the range of punishments says little about the required fault element. To take a stark example, criminal negligence causing death, with a possible

punishment of life in prison, has an objective fault element requirement. Theft under five thousand dollars, which may be prosecuted by summary conviction, is an offence not only requiring subjective fault but specific intent. I do not find any help in defining the fault requirement of the child abandonment offence that other offences which may be punished with the same or even greater periods of imprisonment require only objective fault.

(c) *Conclusion on the Text of the Provision and Scheme of the Code*

[73] To sum up, none of the considerations that persuaded the Court to adopt an objective fault standard in the categories of offences I have just reviewed is present in the child abandonment offence under s. 218. The prohibition applies to everyone, not just to a particular group engaged in a regulated activity or standing in a particular, defined relationship with the alleged victim. Nothing in the text suggests an intention to impose a minimum and uniform standard of care. There are no references in the text to “dangerous”, “careless” or “reasonable” conduct or any requirement to take “reasonable precautions”. There is no predicate offence and no actual harm is required by the provision. The provision does not create, define or impose a duty to do anything other than in the sense that all criminal offences could be considered to create a duty not to commit them.

[74] I conclude that both what is present in s. 218 of the *Code* and its related provisions and what is absent from it strongly support the view that a subjective fault element is required.

E. *Conclusion*

[75] In my view, the text, context and purpose of s. 218 of the *Code* show that subjective fault is required. It follows that the trial judge did not err in acquitting the respondent on the basis that this subjective fault requirement had not been proved. The Court of Appeal was correct to uphold the acquittal.

V. *Disposition*

[76] I would dismiss the appeal.

The reasons of Rothstein and Moldaver JJ. were delivered by

MOLDAVER J. —

I. Introduction

[77] Section 218 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “*Code*”), makes it an offence to abandon or expose a child under the age of 10 so that the child’s life is or is likely to be endangered or its health is or is likely to be permanently injured. The question presented in this appeal concerns the mental element, or *mens rea*, that applies to the proscribed consequences of abandonment or exposure, namely, the risk of death or permanent injury to the child’s health.

Specifically, is fault to be judged subjectively, which is to say, focusing on whether the accused actually knew that abandoning the child would put its life or health in danger? Or is it to be judged objectively, focusing on whether a reasonable person in the same circumstances would have known that abandoning the child would put its life or health in danger? Notwithstanding this crime's ancient lineage — and the vital purpose it serves in protecting the most vulnerable among us — it is a question about which this Court has not spoken.

[78] The facts and judgments below have been set out by Cromwell J. for the majority, whose reasons I have had the opportunity of reading. Like the majority, I too would uphold the respondent's acquittal, but for reasons that differ from those of Justice Cromwell.

[79] My colleague concludes that s. 218 requires subjective foreseeability of the consequences that follow or are likely to follow upon the child being abandoned or exposed. Under this approach, to sustain a conviction, the Crown would be required to prove, among other things, that upon abandoning or exposing the child, the accused foresaw that his or her conduct placed or was likely to place the child at risk of death or permanent injury, and went ahead anyway, reckless as to the consequences.

[80] Respectfully, I do not read the provision as requiring such a high degree of fault in respect of the proscribed consequences. Nor do I believe that such an interpretation reflects Parliament's will.

[81] In its essence, s. 218 is child protection legislation. It seeks to protect a limited class of people (children under the age of 10) from two defined risks (death or permanent injury) that occur or are likely to occur from abandoning or exposing the child. And, as I will explain, the section is aimed at three limited classes of people faced with a situation where a child under 10 is or is likely to be at risk of death or permanent injury: (1) those who have a pre-existing and an ongoing legal duty to take charge of the child; (2) those who choose to come to the aid of the child in that situation; and (3) those who place the child in that situation.

[82] Construed this way, as I believe s. 218 is meant to be, penal negligence is sufficient to satisfy the fault component of the provision as it relates to the consequences of abandoning or exposing a child. To prove penal negligence, the Crown must establish that a reasonable person would have foreseen that his or her conduct placed, or was likely to place, the child at risk of death or permanent injury and that the accused's conduct constituted a marked departure from that expected of a reasonable person in the circumstances.

[83] The recognized tools of statutory interpretation support the conclusion that penal negligence is the requisite fault element for the proscribed consequences in s. 218 of the *Code*. In what follows, I propose to canvass the plain language of the provision, its legislative history, relevant scholarly opinion, and this Court's precedents in an attempt to establish as much. But I also propose to rely on some common sense. Indeed, when one steps back from the mechanistic and often result-



driven application of the seemingly endless and at times contradictory tools of statutory interpretation, common sense may, and generally will, prove to be the best guide to statutory interpretation. It certainly is here, as I will explain.

## II. Analysis

### A. *Understanding the Elements of the Offence of Child Abandonment*

[84] As with all offences, to secure a conviction under s. 218, the Crown must prove, beyond a reasonable doubt, that the conduct of the accused satisfies every element of the offence. For convenience, I set out the provision in its entirety:

**218.** [Abandoning child] Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Section 214 of the *Code* defines the words “abandon” and “expose” for the purposes of s. 218, and reads as follows:

**214.** In this Part,

“abandon” or “expose” includes

(a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and

(b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

[85] It bears noting that the offence under s. 218 is not concerned with an act of abandonment or exposure in the abstract, or even the act of abandoning or exposing any child. Rather, it is concerned with an act of abandoning or exposing a child under 10 so that the child is subject to certain risks. There are thus three distinct elements, as follows:

1. An act of abandonment or exposure,
2. of a child under the age of 10,
3. so that the child's life is or is likely to be endangered *or* its health is or is likely to be permanently injured.

[86] These three elements have been termed “acts”, “circumstances” and “consequences”. See D. Ormerod, *Smith and Hogan's Criminal Law* (13th ed. 2011), at p. 56. The act — here, abandonment or exposure — speaks to the conduct that, on its own or because of its consequences, the law seeks to punish. The circumstances — here, a child under 10 — bring more specificity to the conduct by identifying certain facts or conditions that must be present. Finally, the consequences — here, the risk to the child's life or health — are the result that the law seeks to prevent. Breaking an offence down into its various parts is important because, as Professor

Ormerod observes, “the law may require different mental elements for the various constituents” (p. 56). This is true with respect to s. 218 and, for reasons I will explain, care must thus be taken to distinguish between the act, its circumstances and its consequences in assessing the requisite *mens rea* for the offence.

[87] The *mens rea* of an offence “does not exist in the air or in the abstract but must be related to certain consequences or circumstances” (K. Roach, *Criminal Law* (5th ed. 2012), at p. 164). As a general rule, a mental element, whether subjective or objective, will accompany each physical element of a crime, be it the act, its circumstances or its consequences. For example, as the third element in s. 218 requires that the child’s life or health is or is likely to be placed at risk, absent an exception to the rule, there must be an accompanying mental element of some kind, whether subjective or objective, that addresses the accused’s state of mind in respect of the risk to the child.

[88] Furthermore, it is worth recalling that a particular offence may well have some mental elements that are assessed subjectively and others that are assessed objectively. In *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 80, L’Heureux-Dubé J., for the majority, refused to accept that “an offence must be either subjective or objective with no possible middle ground”. In her view,

the *mens rea* of a particular offence is composed of the totality of its component fault elements. The mere fact that most criminal offences require some subjective component does not mean that every element of the offence requires such a state of mind. [Emphasis in original; para 80.]

With that point in mind, one must be careful not to speak of a crime as requiring simply subjective or objective *mens rea*. Such conclusions “tell only part of the story”, and a “more precise approach” requires identifying each mental element in relation to its coordinate physical element (Roach, at p. 164). Accordingly, the task before us is to identify the mental element *for each* of the three physical elements of the offence of child abandonment — the act, the circumstances and the consequences.

[89] That brings me to the presumption that Parliament intends crimes to have a subjective fault element. My colleague does a thorough analysis of the subject and concludes that

the presumption of subjective fault is not an outdated rule of construction which is at odds with the modern approach to statutory interpretation repeatedly endorsed by the Court. On the contrary, the presumption forms part of the context which the modern approach requires to be considered. [para. 28]

[90] I do not take issue with that observation. Care must be taken, however, to keep the presumption in its proper perspective. As Morris Manning and Peter Sankoff observe in their treatise:

While generally correct, even [the presumption of subjective *mens rea*] runs the possibility of being misinterpreted. Although subjective fault is clearly the preferred standard, this has not always extended to every element of the offence, and it is particularly controversial in relation to the mental foresight required for particular consequences. [Emphasis added.]

(Manning, Mewett & Sankoff: *Criminal Law* (4th ed. 2009), at p. 153)

[91] The authors' caution is well founded. A line of decisions from this Court, beginning with *R. v. DeSousa*, [1992] 2 S.C.R. 944, have made clear that criminal law may justifiably "distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused" (p. 967). Thus, for so-called "predicate" offences, the law requires subjective *mens rea* only for the underlying act, while accepting objective *mens rea* for the *consequences* that flow from that act. As McLachlin J. (as she then was) aptly put it in *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 54, "[c]onsequences can be important."

[92] More broadly, however, the adoption of objective *mens rea* for the consequences of a particular act is not confined to predicate offences. Such a narrow approach would "not [be] consistent with the way in which this Court has defined standards of fault" (*Hinchey*, at para. 81). In the end, "the question of which crimes can legitimately possess objective fault elements . . . will often depend on the wording of a particular section as well as its legislative purpose and context" (para. 83). Bearing that observation in mind, this Court has concluded in certain cases other than those dealing with predicate offences that objective *mens rea* is the appropriate standard with respect to the consequences of particular acts. See, e.g., *R. v. Lohnes*, [1992] 1 S.C.R. 167 (causing a disturbance); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (conspiracy to prevent or lessen competition unduly); *R. v. Naglik*, [1993] 3 S.C.R. 122 (failing to provide the necessities of life).

[93] The same logic applies here. For reasons I will develop, the wording of s. 218, its legislative purpose and its context lead to the conclusion that objective *mens rea* is the standard against which the third element of the offence — the consequences of abandoning or exposing a child — is to be measured.

B. *Some Common Sense About Child Abandonment*

[94] As Professor Don Stuart has observed, “[m]ore ink has been spilt over the guilty mind concept than any other substantive criminal law topic” (*Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 167). The cases and commentary are muddled by a “bewildering variety of terminology” and “semantic acrobatics” (p. 167). Regrettably, the case at hand is no exception. Before turning to the task of statutory interpretation, then, I think it important to pause and reflect on the offence we are tasked with interpreting.

[95] As mentioned, s. 218 is child protection legislation. It seeks to protect children under the age of 10 who cannot fend for themselves and who, for that reason, are among society’s most vulnerable members. To be sure, abandoning or exposing a child under the age of 10 is a risky matter. No reasonable person would suggest otherwise. Given the inherent danger of abandoning or exposing a helpless child, Parliament has chosen to criminalize such conduct, but only to the extent that it places or is likely to place the child at risk of death or permanent injury. To put the matter somewhat differently, s. 218 reflects an effort by Parliament to require certain individuals to take care of a young child in certain situations that threaten its life or

health. In the interests of protecting the child, the provision thus imposes a societal minimum standard of conduct.

[96] Once it is accepted that in enacting s. 218 Parliament intended to guard against dangerous conduct that any reasonable person would foresee is likely to endanger a child's life or expose it to permanent injury, I fail to see why Parliament would turn around and provide accused persons with a host of defences based on their individual characteristics. Doing so would effectively defeat the provision's purpose of imposing a societal minimum standard of conduct, since crimes of subjective fault require an assessment of personal characteristics to the extent that they tend to prove or disprove an element of the offence (*Creighton*, at p. 63). Age, temperament, mental development, experience, sophistication and education would all factor into the determination of whether a particular accused appreciated the risk of harm resulting from the inherently dangerous conduct of abandoning or exposing a helpless child. Of particular concern, such an approach would provide a defence to the errant parent or irresponsible caregiver who, by virtue of intoxication, could not or did not foresee the likely consequences of his or her dangerous conduct, whether it be locking a child in a car on a hot summer's day or exposing a child to the elements on a cold winter's night.

[97] I do not accept that Parliament, in enacting s. 218, contemplated such a self-defeating regime. Common sense suggests that Parliament would not treat the lives and safety of innocent children with such indifference.

[98] These observations are neither new nor novel. One need only look back to the last time this Court addressed the fault requirements of a child protection measure in the *Criminal Code* to find support for an objective standard in this context. In *Naglik*, the Court interpreted the fault requirements for s. 215 — a sister provision to s. 218 that punishes a failure to provide the necessities of life. No member of the *Naglik* Court questioned the need for an objective standard. Indeed, every member of the Court recognized that anything other than an objective standard would undermine the provision’s purpose. Even Lamer C.J., who would have allowed for some personal characteristics, was unequivocal that a subjective standard was untenable in this context:

Section 215 is aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct. [Emphasis added; emphasis in original deleted; p. 141.]

Justice McLachlin (as she then was), speaking for the majority on this issue, went further, holding that personal factors such as “youth, experience, [and] education” have no place in adjudicating fault for this kind of offence (p. 148). With respect, I believe the same holds true for s. 218.

C. *Section 218 Is a Duty-Based Offence*

[99] Turning then to the heart of the matter, in my view, s. 218 is a duty-based offence — no less so than its sister provision s. 215. Admittedly, the wording of s.



218 is not as explicit as the wording of s. 215 and more work is needed to uncover the true purpose of s. 218 and the individuals it targets. However, if s. 218 is duty-based, then the reasoning that led this Court in *Naglik* to conclude that penal negligence satisfies the fault element in s. 215 applies with equal force to s. 218 as a matter of principle and precedent. It is really as simple as that.

[100] As indicated, I am satisfied that s. 218 targets three limited classes of people faced with a situation where a child under 10 is or is likely to be at risk of death or permanent injury:

1. those who have a pre-existing and an ongoing legal duty to take charge of the child;
2. those who choose to come to the aid of the child in that situation; and
3. those who place the child in that situation.

I explain my thinking in what follows.

(1) The Language of Sections 214 and 218

[101] Turning to the first group mentioned above, while s. 218 of the *Code* does not itself refer to persons who have a legal duty to take charge of a child under the age of 10 years, s. 214, which provides a non-exhaustive definition of the terms “abandon” and “expose” as used in s. 218, incorporates such persons expressly. Part

(a) of the definition includes within the meaning of “abandon” or “expose” “a wilful omission to take charge of a child by a person who is under a legal duty to do so”.

[102] As a consequence of this language, s. 218 plainly takes in a large swath of people *who owe a legal duty* to take charge of a child under the age of 10 — including parents, foster parents and guardians, the people most likely to run afoul of the provision by virtue of being the central figures in a child’s life. Once that is accepted, as I think it must be, I fail to see how or why the provision should not be characterized as “duty-based”.

[103] The recognition that s. 218 sweeps within its ambit persons who are *already* duty-bound to protect a child leads to the central difficulty with holding that s. 218 is, in its entirety, a subjective *mens rea* offence. Put simply, if the great bulk of people to whom the provision applies have a pre-existing and ongoing legal duty to take charge of children who fall below the age of 10, it hardly seems reasonable, or right, that they should be judged against a subjective *mens rea* standard when the very same people who run afoul of the duty-based provision next door (s. 215) are judged on a penal negligence standard (see *Naglik*). Self-evidently, the result would be a double standard — an objective standard under s. 215 and a subjective standard under s. 218 — for provisions that serve similar, if not identical, purposes: protecting the same children, imposing a duty on the same people, guarding against the same consequences.

[104] One might be inclined to justify such a double standard on the basis of a key difference in s. 218, namely that it applies to people who have a pre-existing and ongoing legal duty to children under the age of 10 *and* to those who do *not* have such a duty, by virtue of part (b) of the definition of “abandon” or “expose” in s. 214. That part of the definition includes persons “dealing with a child in a manner that is likely to leave that child exposed to risk without protection”, which at first blush could be read as sweeping in a large number of people who have no pre-existing duty to the child.<sup>1</sup>

[105] If one were inclined to argue that part (b) makes a critical difference, one might reason that Parliament picked the better of only two options before it with respect to *mens rea*. Parliament could have identified an objective *mens rea* standard in s. 218 for those with a pre-existing and ongoing duty (to achieve harmony with s. 215) and a subjective *mens rea* standard for the others captured by part (b) (to restrict the scope of criminal liability). However, this result — a single crime that contemplates different mental standards for different persons engaging in the same culpable acts — is entirely foreign to our criminal law. Surely, Parliament did not intend this. The only remaining option, then, might be to allow persons with a pre-existing and ongoing duty to reap the benefit of the subjective higher standard, even if that created a double standard for them. Such a result, it might be argued, would ensure that those additional individuals caught by part (b) of the s. 214 definition are not unjustly branded as criminals. That is the approach the majority adopts.

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<sup>1</sup> For convenience, I will refer in what follows simply to the “s. 214 definition”.

[106] Respectfully, I would prefer not to endorse such a stark double standard — and, fortunately, I need not do so. There is a third option. Section 218 can, and in my view should, be read purposefully and harmoniously, such that it applies only to persons who are cloaked with a duty, whether pre-existing and ongoing *or situational*, to protect a particular child under the age of 10 from death or permanent injury, *all of whom* are properly subject to an objective standard with respect to the consequences element of s. 218. Let me explain.

[107] Manifestly, the language of part (b) of the s. 214 definition is broad. The plain language of the words “dealing with a child” can connote much; the question is how much. In my view, they are meant to capture those people who take active steps to alleviate a situation or who place a child in a situation that will, or is likely to, endanger the child’s life or cause it permanent injury — the second and third groups to which I referred above. Such persons are cloaked with a *situational* duty to take reasonable steps to preserve and protect the life and safety of the child during the course of their limited involvement with the child.

[108] The facts of the present case provide a fitting example. The store manager became duty-bound to the child, A.J.H., when he removed him from the toilet. Having taken active steps to come to the child’s aid, he was cloaked with a duty to take reasonable steps to protect the child from further harm. No such duty attached to the assistant store manager or the store patrons, however, as they did not

choose to become directly involved with the child. Consequently, they did not “dealt with” the child within the meaning of s. 214.

[109] Situational duties of the kind I describe here are far from foreign to the *Code*. I gain comfort in the case at hand from ss. 216, 217 and 217.1 of the *Code*, each of which contemplate a duty imposed by law on an individual who undertakes to do something by virtue of positive actions. Section 217, for example, provides:

**217.** Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

[110] Much like the language in part (b) of the s. 214 definition of “abandon” or “expose”, the language of “undertak[ing] to do an act” in s. 217 is capable of a sweeping definition. But that is not the path the criminal law has followed — and wisely so. As Abella J.A. (as she then was) observed in *R. v. Browne* (1997), 33 O.R. (3d) 775:

There is no doubt that the definition embraces an interpretive continuum ranging from an assertion to a promise. But it seems to me that when we are deciding whether conduct is caught by the web of criminal liability, the threshold definition we apply must justify penal sanctions. . . . The word “undertaking” in s. 217 must be interpreted in this context. The threshold definition must be sufficiently high to justify such serious penal consequences. The mere expression of words indicating a willingness to do an act cannot trigger the legal duty. There must be something in the nature of a commitment, generally, though not necessarily, upon which reliance can reasonably be said to have been placed. [Emphasis added; pp. 779-80.]

[111] In my view, Justice Abella's conclusion with respect to s. 217 points to the proper construction of part (b) of the s. 214 definition as cloaking with a duty to act reasonably only those people who by active steps undertake to preserve and protect a child from death or permanent injury (the second group mentioned above). By the same token, it does not require a leap of logic to conclude that "dealing with" a child within the meaning of part (b) of the s. 214 definition must similarly be restricted in scope to those who actually place the child in a situation in which it is put at risk of death or permanent injury (the third group).

[112] When one steps back to look at the broader picture, the understanding that one's positive actions can give rise to a situational duty is a principle well known to the common law. As Professors Colvin and Anand have noted, historically there have been "three reasonably well-established categories of duty to act" (*Principles of Criminal Law* (3rd ed. 2007), at p. 141). The first is well known and concerns "general relationships of care and protection", such as those captured by part (a) of the s. 214 definition. The second concerns "specific undertakings to act" (see, e.g., *R. v. Nicholls* (1874), 13 Cox C.C. 75; *The Queen. v. Instan*, [1893] 1 Q.B. 450) and the third concerns duties arising from "causal responsibility for dangerous situations" (see, e.g., *The Queen. v. Salmon* (1880), 6 Q.B.D. 79; *R. v. Coyne* (1958), 124 C.C.C. 176 (N.B.S.C. (App. Div.)); *R. v. Miller*, [1983] 1 All E.R. 978 (H.L.)). See also Ormerod, at pp. 70-75 (including "[p]arents and other relations", "[v]oluntary undertakings", and "[c]reating a dangerous situation" as categories). These three categories map precisely to the three groups of individuals who I conclude come

within the ambit of s. 218. While it is, of course, true that our criminal law does not include common law offences, in my view, the wording of part (b) of the s. 214 definition reflects a specific statutory instantiation of the second and third of these long-standing common law principles — much like ss. 216, 217 and 217.1 do — in this case with respect to young children.

[113] Interpreting the scope of s. 218 in this way, as I believe it was meant to be, goes a long way toward addressing concerns about the broad scope of potential liability under the provision. The spectre of criminal liability under the offence is not overly broad. Indeed, the interpretation I favour may be narrower than that endorsed in the majority position, which does not delineate the type of conduct that would amount to “dealing with” a child. All else being equal, I thus cannot accept that the scope of this offence is a valid ground to require subjective foresight of the consequences proscribed by s. 218.

## (2) The Statutory Scheme

[114] I also note that s. 218 finds its place in Part VIII of the *Code* under the heading “Duties Tending to Preservation of Life”. It is one of two offences located under that heading — the other being s. 215. In my view, this provides some indication that Parliament intended that s. 218 be construed as a duty-based offence.

[115] In her text, *Sullivan on the Construction of Statutes* (5th ed. 2008), Professor Ruth Sullivan, a leading authority on the construction of statutes, observes

that “headings are a valid indicator of legislative meaning and may be taken into account in interpretation” (p. 394). See also *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 47. Of particular note, in discussing the relationship between provisions grouped under the same heading, she writes:

When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. [Emphasis added; p. 396.]

[116] While I do not place undue weight on it, I think some significance can be attached to the fact that s. 218 is coupled with one other offence, s. 215, which is clearly duty-based. And as I have just noted, s. 218 is grouped with other provisions (ss. 216, 217 and 217.1) that speak to the creation of legal duties in particular circumstances. Manifestly, s. 218 is embedded in a number of provisions which have, as their common denominator, the concept of “duty”. That being so, it seems anomalous that Parliament would, for no apparent reason, insert a non-duty-based offence into a thicket of duty-related provisions. The scenario becomes even more remarkable when one appreciates that s. 218 is concerned with inherently dangerous conduct that is or is likely to put the lives and safety of helpless young children at risk — the very type of situation which, in my view, requires a societal minimum standard of conduct and calls out for a standard of fault based on objective foreseeability.

[117] The reason, in my view, why the word “duty” is not found in s. 218 is because s. 218 deals primarily with acts of commission, whereas s. 215 deals with



acts of omission. We do not speak of parents failing “not to abandon” their children or failing “not to expose” them to the risk of death or permanent injury. The gravamen of s. 218 lies not in the failure of an accused to do that which he or she is legally obliged to do (although part (a) of the s. 214 definition accounts for such a situation) but rather, the doing of something that is inherently dangerous — abandoning or exposing a helpless child to the risk of death or permanent injury.

### (3) Scholarly Opinion

[118] Finally, I note that scholarly opinion on the offence of abandoning or exposing a child under s. 218 of the *Code* is sparse, but that which there is suggests the offence is duty-based.

[119] In his treatise, Professor Stuart indicates that the offence of child abandonment is a duty-based offence, although not one where the duty is stated within the offence. He places it in the category of “[o]ffences that extend to omissions but do not create a legal duty to act so a legal duty outside the offence must be found” (p. 96). According to Professor Stuart, this category describes two types of offences, the first of which encompasses child abandonment:

The first is where the Code offences refer to a duty without defining it. Examples occur in the case of the offences of permitting an escape by failing to perform “a legal duty” (section 146(a)), committing a common nuisance by failing to discharge “a legal duty” (section 180), and abandoning a child by omitting to take charge of it when under “a legal duty to do so” (sections 214 and 218). [Emphasis added; p. 96.]

[120] As I have explained, narrowing the scope of the offence under s. 218 exclusively to those who have a pre-existing and ongoing duty cannot be supported by the plain text of the provision in light of part (b) of the s. 214 definition of “abandon” or “expose”. Nonetheless, I would take Professor Stuart as making the more modest point that s. 218 at least in part looks to those with such pre-existing and ongoing duties and, as such, is properly characterized as duty-based.

[121] Likewise, Professor Roach, at pp. 115-16 of his text, explains that although an omission will not generally constitute the *actus reus* of an offence, a failure to act will suffice where an individual has a “specific legal duty to act”. He then includes child abandonment in his list of duty-based offences:

There is a duty to use reasonable care when providing medical treatment or other lawful acts that may endanger the life of others. This duty was breached by a person who donated blood that he knew was infected with HIV. It is also an offence not to use reasonable care in handling explosives; to disobey a court order; to fail to assist a peace officer when requested; to abandon a child; not to obtain assistance in child-birth; to fail to stop when your vehicle is involved in an accident; to neglect animals; and to fail to take steps to protect holes in ice or open excavations. [Footnotes omitted; emphasis added; p. 116.]

[122] Finally, Manning and Sankoff, at p. 826 of their treatise, take a glum view of s. 218, calling it “entirely superfluous” on the basis that “there does not appear to be a conceivable situation in which abandonment would not also constitute a failure to provide the necessities of life [under s. 215]”. Again, I note that this analysis neglects to take any account of part (b) of the s. 214 definition of “abandon” or “expose” and I do not comment on their thesis that s. 218 is superfluous. But setting

those matters aside, in saying that s. 218 is entirely subsumed by s. 215 — which everyone agrees is a duty-based offence — these authors must be taken as accepting that s. 218 is likewise a duty-based offence.

(4) Conclusion on the Duty-Based Nature of Section 218

[123] To sum up, the plain language of s. 218 — supported by the place of situational duties in Canadian criminal law, the offence’s placement among other duty-based provisions in the *Code* and the scholarship on s. 218 — leads to the conclusion that the offence of child abandonment is duty-based. It is targeted at three distinct groups faced with a situation where a child under 10 is or is likely to be at risk of death or permanent injury: first, by virtue of part (a) of the s. 214 definition, those with a pre-existing and ongoing duty to take charge of the child; second, by virtue of part (b), those who “dea[l] with” the child by undertaking positive steps to come to its aid in that situation; and third, again by virtue of part (b), those who “dea[l] with” the child by placing it in that situation.

[124] With this in mind, I turn again to the wording of s. 218, and particularly the language employed with respect to the consequences, the mental element of which forms the crux of this case:

218. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured . . . .

[125] This language, which we are tasked with interpreting today, is strikingly similar to that which this Court explained in the context of s. 215, the sister provision to s. 218 concerning a failure to provide the necessities of life. As I have already mentioned, this Court held in *Naglik* that the *mens rea* for s. 215 is in relevant part satisfied on an objective basis. In an opinion unanimous on this issue, Lamer C.J., at p. 143, asked rhetorically, “What parts of the offence must be objectively foreseeable?” and then identified the subparagraph in s. 215 that I emphasize below:

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

(a) with respect to a duty imposed . . .

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently . . .

[126] As is apparent, the relevant language in both provisions is strikingly similar. If s. 218 is duty-based, as I have attempted to show it is, then this should be the end of the matter — there is no basis in principle or precedent for departing from the rule announced in *Naglik*. This Court’s reasoning with respect to s. 215 applies with equal force to s. 218, and it does not stand to reason that the mental element for the risk element of child abandonment is anything other than objective. But if that is not enough, there is more.

D. *The Legislative History Confirms an Objective Standard for the Proscribed Consequences*

[127] The legislative history of s. 218 is traceable to *The Offences against the Person Act, 1861*, 24 & 25 Vict., c. 100. The forerunner to what is now s. 218 is found in s. 27 of that Act, accompanied by the following marginal note: “Exposing Children whereby Life endangered”. The provision, in its relevant part, reads as follows:

**27.** Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor . . . .

[128] I have emphasized the word “whereby” which I take to mean “in consequence of” — hardly words one normally associates with subjective foresight. To be sure, this was no oversight. Words such as “knowingly”, “maliciously” and “with intent”, commonly understood as indicating a requirement of subjective *mens rea*, are used throughout the Act.

[129] In 1869, Canada’s Parliament enacted the *An Act respecting Offences Against the Person*, S.C. 1869, c. 20. Section 26 of that Act tracked the wording of s. 27 of the English statute in all material respects:

**26.** Whosoever unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered, or the health of such child has been, or is likely to be permanently injured, is guilty of a misdemeanor . . . .

[130] In 1893, Canada's first *Criminal Code* came into force (*The Criminal Code, 1892*, S.C. 1892, c. 29). Under the heading "Duties Tending to the Preservation of Life", Parliament created several duty-based offences. Embedded in them was s. 216, accompanied by the following marginal note: "Abandoning children under two years of age". Section 216 provided as follows:

**216.** Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection.

[131] As is self-evident, the first part of the provision essentially tracks the language of s. 26 of *An Act respecting Offences Against the Person*. The second part is new and very much resembles what is now parts (a) and (b) of the s. 214 definition of "abandon" or "expose" — with one notable exception. The second half of s. 216(2) reads: ". . . any mode of dealing with [the child] calculated to leave it exposed to risk without protection", whereas part (b) of the s. 214 definition reads: "dealing with a child in a manner that is likely to leave that child exposed to risk without protection". In short, the words "calculated to leave" were replaced by the words "likely to leave". Though the change may appear highly meaningful to modern eyes, care must be taken not to confuse obsolete and current meanings of those words. As the majority observes, in the 18th and 19th century, "calculated to" and "likely to"

were synonyms.<sup>2</sup> This change occurred with the adoption of the new 1953-54 *Criminal Code* (c. 51, s. 185) and thus is perhaps best explained as an attempt to update language to reflect current usage. As Professor Sullivan notes, such a statutory revision can serve “to ensure the clarity, consistency and readability” of the revised act, as a result of which “outdated terminology may be modernized” (pp. 653-54). The wording of the provisions creating the offence of abandonment, now ss. 214 and 218, has not been amended since.

[132] The plain language of the provision aside, early judicial interpretations of the child abandonment provision can be helpful in interpreting the modern-day s. 218. In the leading English authority of *The Queen. v. White* (1871), L.R. 1 C.C.R. 311, a father failed to take custody of his nine-month-old child. The child was left on the road in front of the father’s home by his estranged wife, who demanded that he take the child. The father was charged and convicted under s. 27 of the *Offences against the Person Act, 1861*, and the conviction was upheld on appeal.

[133] The *White* decision makes no mention of subjective *mens rea* as being required to make out the offence of abandonment. Indeed, it suggests the opposite, as evidenced by the following passage from Chief Justice Bovill’s opinion, to which the remaining four justices subscribed:

Instead of protecting and providing for the child, as it was his duty to do, [the father] allowed it to remain lying, first at his door, and afterwards in

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<sup>2</sup> This observation is borne out by the French version of the 1892 provision in which the words “calculated to leave” are “*de nature à . . . laisser*”.

the road, insufficiently clothed, and at a time of year when the result was likely to be the child's death. [Emphasis added; p. 313]

In my view, the language used by Bovill C.J. is the language of objective foreseeability (death was the likely result) and not the language of subjective foreseeability (he *knew* that death was likely to result).

[134] I acknowledge that in a separate opinion written by Blackburn J., language is used from which one might conclude that he viewed the crime of abandonment as requiring subjective foresight:

. . . upon [the father] there is a strict legal duty to protect the child. And when the child is left in a position of danger of which he knows, and from which he has full power to remove it, and he neglects his duty of protection, and lets the child remain in danger, I think this is an exposure and abandonment by him. [p. 314]

I do not read that passage as indicating that subjective foresight is required to make out the offence of abandonment. Rather, on Justice Blackburn's assessment of the facts, the father clearly knew that the child's life was imperilled and yet did nothing about it. I would not, and do not, suggest that a person who in fact subjectively foresees a risk of death or permanent injury to the child cannot be convicted under s. 218. But that is different from holding that subjective foreseeability is an essential ingredient of the crime. Where an offence is satisfied — at a minimum — on an objective standard, subjective proof will obviously suffice to sustain a conviction.



See *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 47; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at para. 38.

[135] To conclude on this point, the fact that the provision contains no words that can be read as requiring subjective foresight of the proscribed consequences is significant. As mentioned, the words “calculated to leave” were removed in the 1953-54 *Criminal Code* and replaced by the words “likely to leave”. At the same time, the age of protected children was raised from two years to ten years and the word “whereby” was replaced with the synonymous words “so that”. If Parliament had wanted to make it clear that subjective foreseeability was the requisite fault element, it could have done so when revising the language of the provision by using the words “knowing that” instead of “so that” in s. 218 and by changing the words “calculated to leave” to “he knows is or is likely to leave” in part (b) of the s. 214 definition. As Professor Sullivan notes, “[i]t is presumed that in so far as possible legislatures will adopt a simple, straightforward and concise way of expressing themselves” (p. 207). But instead of making what would have been a straightforward change, Parliament preserved the original meaning of the provision which, as I have attempted to show, was understood as requiring objective, not subjective, foreseeability of the prohibited consequences.

E. *The Social Stigma and Gravity of the Offence Support an Objective Standard for the Proscribed Consequences*

[136] I touch, finally, on two other factors that support the conclusion that the fault element for s. 218 is penal negligence: the social stigma attached to the crime of child abandonment and the gravity of the crime. As McLachlin J., for the majority, observed in *Creighton*, at p. 46, the *mens rea* of an offence should reflect the gravity of the crime. Both the social stigma associated with its commission and the penalty provided by Parliament afford a measure of that gravity.

[137] The social stigma associated with the offence of child abandonment cannot — and in my view should not — be treated differently than the social stigma associated with its sister provision s. 215 (failure to provide necessities) where penal negligence was found to be the requisite fault element. Indeed, as I noted earlier, in their treatise, at p. 826, Manning and Sankoff write that the offence of child abandonment is “entirely superfluous” given its overlap with the offence providing the necessities of life under s. 215 of the *Code*:

Given that the “necessaries of life” include shelter and protection from harm, there does not appear to be a conceivable situation in which abandonment would not also constitute a failure to provide the necessities of life.

[138] Whether that statement is entirely accurate or not, it leads me to conclude that ss. 215 and 218 should be ranked equally on the social stigma scale. They certainly rank equally in terms of their gravity. Both offences are punishable by a maximum penalty of five years’ imprisonment (if the Crown proceeds by way of

indictment) and 18 months' imprisonment (if the Crown proceeds by way of summary conviction).

[139] Put differently, if Parliament had intended to build subjective foreseeability into s. 218, the degree of moral blameworthiness would necessarily be higher than that required to sustain a conviction under s. 215, which requires only objective foreseeability. If that were the case, one could reasonably expect, in my view, that the higher level of moral culpability would be reflected by a more severe punishment. But this is not so.<sup>3</sup> And that leads me to conclude that the two provisions encompass the same degree of blameworthiness and thus require the same degree of mental fault.

[140] Finally, without wishing to minimize the nature and severity of the punishments available under ss. 215 and 218, they are significantly removed from other crimes which this Court has held to be crimes involving objective foresight, including manslaughter and certain instances of dangerous driving causing death — both of which attract maximum punishments of life imprisonment.

#### F. *The Remaining Elements of the Offence*

[141] As explained earlier, there are three distinct elements to the offence of child abandonment: the act (abandonment or exposure), the circumstances (a child

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<sup>3</sup> *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, ss. 11 and 12, had the effect of harmonizing the available sentences under ss. 215 and 218.

under 10), and the consequences (the risk of harm to the child). The focus of my analysis thus far has been the third element. I turn now to the first and second elements, taking each in turn.

(1) “Abandon” or “Expose” — And the “Wilful” Red Herring

[142] Although there are no words of subjective intent in s. 218, the word “wilful” is used in part (a) of the s. 214 definition of “abandon” or “expose” to modify the word “omission”. Much of the focus on the word, unfortunately, has served as a red herring, distracting from its actual function in the language of s. 218. Whatever meaning attaches to “wilful”, it speaks to the interpretation to be given to the act in the first element of the offence (abandoning or exposing). It offers little, if any, assistance in interpreting the third element (risk to the child).

[143] As far back as 1898, in the case of *R. v. Senior*, [1899] 1 Q.B. 283, Lord Russell of Killowen C.J. considered the meaning of the word “wilfully” in s. 1 of the *Prevention of Cruelty to Children Act, 1894*, 57 & 58 Vict., c. 41, which among other things, made it an offence to “wilfully” assault, ill-treat, neglect, abandon or expose a child under the age of 16 “in a manner likely to cause such child unnecessary suffering, or injury to its health”. At pp. 290-91, the Chief Justice stated:

Whether the words in the statute, “wilfully neglects,” are taken together, or, as the learned judge did in directing the jury, are taken separately, the meaning is very clear. “Wilfully” means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. [Emphasis added.]

[144] Modern-day authorities have accepted that the word “wilful” may be used to indicate a voluntary or deliberate act, one that the mind “goes with”. See, e.g., *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), at pp. 715-17; *R. v. L.B.*, 2011 ONCA 153, 274 O.A.C. 365, at paras. 108-9, leave to appeal refused, [2011] 4 S.C.R. x ; and Manning & Sankoff, at pp. 149-50.

[145] In my view, a fair reading of the provision establishes that the word “wilful” in s. 214 does not connote an intention to bring about the proscribed consequences identified in s. 218. Rather, it modifies “omission” in part (a) of the definition of “abandon” or “expose” and connotes, as Lord Russell C.J. described it, an act “done deliberately and intentionally, not by accident or inadvertence”.

[146] To put the matter in more contemporary terms, basic intent or voluntariness is all that is required to satisfy the minimum mental element for the act of abandonment or exposure. That conclusion sits independently from — and is entirely harmonious with — the separate conclusion that penal negligence is the proper mental standard for the third element in s. 218. It would be a mistake to confuse the two.

## (2) The Age of the Child

[147] Lastly, I turn to the second element of the offence, the age of the child. This element was not an issue in this appeal, as it was self-evident and undisputed that A.D.H.’s newborn baby was under the age of 10. Nevertheless, mindful that the

age of the child is a question of circumstances and not consequences of the offence, and absent any indicators that Parliament intended an objective standard for this element, I would be inclined to hold that this element should be established on the basis of subjective fault. However, as this matter is not before us, I need not say more about it.

G. *Some Thoughts on Intoxication as a Defence*

[148] Earlier in these reasons, I voiced my concern that an interpretation of s. 218 that requires subjective foresight of consequences would provide a defence to the errant parent or irresponsible caregiver who, by virtue of intoxication, could not or did not foresee the likely consequences of his or her dangerous conduct. While it is true that none of the parties raised this point in their arguments, I believe that the ramifications that flow from interpreting a statutory provision in one way or another are a necessary part of the overall contextual analysis with which we are engaged. That context cannot — and should not — be overlooked on the basis that a relevant issue does not arise on the facts of a particular case.

[149] The majority concludes that s. 218 is a “general intent” offence (para. 16). I would have thought, however, that this Court’s decision in *Hinchey* has pointed us beyond the binary fiction of specific versus general intent offences.<sup>4</sup> This case

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<sup>4</sup> More than three decades ago, dissenting in *Leary v. The Queen*, [1978] 1 S.C.R. 29, Dickson J. (as he then was) recognized that the specific-general intent dichotomy has bewildered the bench and bar ever since it was brought to our shores by this Court’s decision in *R. v. George*, [1960] S.C.R. 871. The difficulty, as Dickson J. put it, was that “there are not, and have never been, any legally adequate criteria for distinguishing the one group of crimes from the other” (p. 40). In comments that I believe

underscores the merit of that approach because the nub of the difficulty is that s. 218, whether under the majority's approach or mine, does not — indeed, it cannot — fit neatly into either the general or specific intent boxes. To attempt to do so is to do what courts have for too long done — broad-brush offences in a way that at once over-generalizes and over-simplifies.

[150] The majority's invocation of *R. v. Daviault*, [1994] 3 S.C.R. 63, and s. 33.1 of the *Code* is no answer to the concerns I raise. First, *Daviault* speaks only to the basic intent or voluntariness needed to commit an intentional act — what Cory J. described as “the minimal mental element required for a general intent offence” (p. 87 (emphasis added)). Our later decision in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, confirms that a so-called *Daviault* defence of “extreme intoxication” relates only to intoxication which “negates voluntariness and thus is a complete defence to criminal responsibility” (para. 43 (emphasis added)). *Daviault* thus says nothing about whether intoxication short of automatism could raise a reasonable doubt about an accused's subjective foresight of consequences, as the majority requires of s. 218.

[151] Second, s. 33.1 of the *Code*, if it is applicable to s. 218, provides a statutory override of a *Daviault* defence — but only to the extent that the accused “lacked the general intent or the voluntariness required to commit the offence”. Assuming for the sake of argument that s. 33.1 does apply to s. 218, it says nothing about intoxication as a defence in relation to the subjective foresight of consequences.

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align well with *Hinchey*, Dickson J. counseled moving beyond labels that are “neither meaningful nor intelligible” to an analysis of the actual “mental element[s] which must be established by the Crown” (pp. 42-43).

As I have said, *Daviault* was only concerned with the basic intent or voluntariness required for an intentional act. Thus, whether s. 33.1 does or does not apply to s. 218 is, in my respectful view, irrelevant.

#### H. *Conclusion*

[152] Section 218 is child protection legislation. It targets three limited classes of people faced with a situation where a child under 10 is or is likely to be at risk of death or permanent injury. A review of the provision's language, its legislative evolution and history, the gravity of the crime and the social stigma associated with it confirm that the offence is duty-based and that penal negligence is the level of fault required to establish guilt as regards the proscribed consequences.

[153] Having so concluded, I hasten to point out that penal negligence involves a very real level of fault. This is emphatically not a matter of punishing the "morally blameless". And while it may not reach the level of subjective fault in respect of each and every element of a particular crime, it does not punish people for acts of simple negligence. As Charron J. observed in *Beatty*, at para. 34:

If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy.



For that reason, an objective test “requires proof of a *marked departure* from the standard of care that a reasonable person would observe in all the circumstances” (*ibid.*, at para. 36 (emphasis in original)).

[154] Nor does an objective standard punish those who act under an honest but mistaken belief that their conduct is not dangerous in the circumstances — so long as the belief is reasonably held. Justice Charron put the matter succinctly in *Beatty*, at paras. 37-38:

However, because the accused’s mental state is relevant in a criminal setting, the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger. . . .

. . . In the same vein, a reasonably held mistake of fact may provide a complete defence if, based on the accused’s reasonable perception of the facts, the conduct measured up to the requisite standard of care.

[155] What the test does not do is take into account the personal attributes of the accused, short of incapacity to appreciate the risk. Nor will it allow people who are drunk or high on drugs to escape liability on the basis that they were not capable of foreseeing, or did not foresee, the likely consequences of their actions. That, with respect, is how it should be. And the circumstances of this case serve to exemplify how the penal negligence standard works to spare the morally blameless from criminal liability.

### III. Application to the Facts

[156] The trial judge found that the respondent, A.D.H., honestly believed that her child was dead at birth. In so concluding, he accepted that the birth was precipitous and the baby was born premature. He also accepted that A.D.H. was confused and frightened at the time and that the baby, after birth, was blue and motionless. The trial judge found objective support for A.D.H.'s belief in the evidence of Dr. Simpson and that of various bystanders who likewise believed the child was dead (2009 SKQB 261, 335 Sask. R. 173).

[157] Based on the trial judge's findings of fact, Ottenbreit J.A. concluded that A.D.H. was entitled to be acquitted. In his view, her belief that the child was dead at birth "was not only honestly held but reasonable in the context of the situation" (2011 SKCA 6, 366 Sask. R. 123, at para. 38). I agree.

[158] In all the circumstances, A.D.H.'s conduct in abandoning her child and leaving him exposed to the risk of death or permanent injury was not morally blameworthy. As such, she was entitled to be acquitted.

[159] Accordingly, I would dismiss the appeal.

## **APPENDIX**

**214.** In this Part,

“abandon” or “expose” includes

(a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and

(b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

...

**215.** (1) [Duty of persons to provide necessities] Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;

(b) to provide necessities of life to their spouse or common-law partner; and

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

(2) [Offence] Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

(3) [Punishment] Every one who commits an offence under subsection (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

(4) [Presumptions] For the purpose of proceedings under this section,

(a) [Repealed, 2000, c. 12, s. 93]

(b) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;

(c) evidence that a person has failed for a period of one month to make provision for the maintenance of any child of theirs under the age of sixteen years is, in the absence of any evidence to the contrary, proof that the person has failed without lawful excuse to provide necessities of life for the child; and

(d) the fact that a spouse or common-law partner or child is receiving or has received necessities of life from another person who is not under a legal duty to provide them is not a defence.

...

**218.** [Abandoning child] Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

*Appeal dismissed.*

*Solicitor for the appellant: Attorney General for Saskatchewan, Regina.*

*Solicitor for the respondent: Saskatchewan Legal Aid Commission,  
Prince Albert.*

*Solicitor for the intervener: Attorney General of Ontario, Toronto.*